IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Number 75-776

S. H. DU PUY and LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

vs.

DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioners, S. H. Du Puy and Liberty Mutual Insurance Company, pray that a Writ of Certiorari issue to review the Order and Judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on August 7, 1975, denying the petition to set aside the Decision of the Benefits Review Board, and that on hearing, the Judgment be reversed.

OPINONS BELOW

The Compensation Order of the Administrative Law Judge was not published, but appears as Appendix A, pp. 1a-5a.

The Decision of the Benefits Review Board was not published but appears as Appendix B, pp. 6a-9a. The Order of the Benefits Review Board denying reconsideration was not published, but appears as Appendix C, p. 10a.

The Opinion of the Court of Appeals is reported at 519 F. 2d 536 (Appendix D, pp. 11a-20a). The Denial of Petition for Rehearing is also reported at 519 F. 2d 536 (Appendix E, p. 21a).

JURISDICTION

The Judgment of the Court of Appeals (Appendix D, pp. 11a-20a) was entered on August 7, 1975. A Petition for Rehearing, timely filed, was denied on September 3, 1975 (Appendix E, p. 21a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §901 *et. seq.* preclude settlements, and approvals thereof, in death benefit claims arising under the Act?

2. If the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §901 *et. seq.* permits settlements in death benefit claims, is approval thereof limited to the Deputy Commissioner?

3. Whether Section 28(a) of the Longshoremen's and Harbor Worker's Compensation Act as amended in 1972, 33 U.S.C. §928(a), should be given prospective application only and not affect attorney's fees incurred after the effective date of the Amendment where the cause of action arose before such Amendment.

STATUTES INVOLVED

The statutes involved are Sections 8, 19, and 28 of the Longshoremen's and Harbor Worker's Compensation Act, as amended October 27, 1972, Pub. L. 92-567, 86 Stat. 1264, 1261 and 1259. These sections are reprinted in pertinent part in Appendix F, pp. 22a-23a.

STATEMENT OF FACTS

On November 6, 1972, Oscar Allen, a grain trimmer employed by Petitioner S. H. Du Puy Company, was injured aboard a ship docked at a grain terminal in Milwaukee, Wisconsin, Mr. Allen, a Jehovah's Witness, refused blood transfusions which to a reasonable medical certainty would have saved his life according to the stipulated testimony of Mr. Allen's physician presented to the administrative law judge (App. p. 3a). On November 11, 1972, Mr. Allen died.

Petitioner Liberty Mutual Insurance Company, insurance carrier for S. H. Du Puy, gave notice it would controvert the case. The widow of the deceased, Dorothy Allen, made claim for death compensation through the Office of Workmen's Compensation Programs in Chicago, Illinois.

After an informal conference between Deputy Commissioner Byrne, claimant and Liberty Mutual, formal

administrative hearing was scheduled for October 18, 1973 before Administrative Law Judge Burnstein. Before this hearing, the parties informed the Judge that a stipulated settlement had been worked out. The Administrative Law Judge issued his Decision (App. A, p. 5a) and ordered a lump sum payment to claimant with claimant's attorney's fees to be paid from the compensation award. Respondent, Director, Office of Workmen's Compensation Programs, Department of Labor, appealed this compensation Order to the Benefits Review Board (BRB) pursuant to 33 U.S.C., 921(b). The BRB vacated the Compensation Order on June 17, 1974 (App. B, pp. 8a-9a) stating that a lump sum settlement could only be approved by the Deputy Commissioner. (App. B, p. 8a) Petitioners request for reconsideration of its Decision and for consideration of the attorney's fees issue raised on the appeal was denied by the BRB Order of July 10, 1974. (App. C, p. 10a)

Petitioners sought review in the Court of Appeals for the Seventh Circuit pursuant to 33 U.S.C. §921(c) as amended 1972, 86 Stat. 1261, 1262. The case was argued and submitted on April 7, 1975. On August 7, 1975, the court denied the petition to set aside the BRB Decision, reluctantly, concluding that neither the Deputy Commissioner nor the Administrative Law Judge had authority to approve the settlement (App. D, p. 19a). A timely petition for rehearing was made on August 21, 1975, and denied on September 3, 1975 (App. E, p. 21a). Because of the court's decision, the issue regarding attorney fees was not decided.

I. UNLESS REVIEWED BY THIS COURT, BENEFICIARIES IN LONGSHOREMAN DEATH CLAIMS WILL FOREVER BE REQUIRED TO "ROLL THE DICE".

A. Department's Action Following the Decision of the Court Below has Precluded Further Possibility of Legal Review.

Prior to the decision of the Seventh Circuit Court of Appeals in this case, the Deputy Directors of the Department of Labor, Office of Workmen's Compensation, had, under Section 8(i)(A) of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §908(i)(A), approved a significant number of compromise settlements involving claims by surviving beneficiaries of deceased longshoremen and harbor workers.

Following the lower court's decision, however, the Department ordered that no further compromise agreements in controverted death benefit cases may be approved. This means, that every claiming survivor of a deceased employee covered by the Longshoremen's Act shall receive either the entire statutory benefit — or absolutely nothing. It also means that there will be no subsequent opportunity for this Court to review a lower court's decision involving the questions of authority to approve death benefit settlements. All future cases will involve only litigated facts and law as there will be no possibility for "approved compromise settlements".

Consideration of these questions is important because the Department has shown its willingness to exercise its authority to approve lump sum settlements, but for the decision of the court below.

B. The Important Questions Raised Here Probably Cannot Reach This Court in any Other Pending Case.

Petitioners know of no other case presently pending in other Circuits where there will be consideration of the basis for the Seventh Circuit's decision so as to lead to potential review by this Court.

Another Circuit Court of Appeals could well reach an opposite conclusion from that rendered by the court below so as to create a conflict between Circuits and, therefore, review by this Court. If, as we believe, there are no similar cases pending, the action of the Department referred to in the preceding section of this Petition, will preclude such questions from reaching other Circuits. It is therefore particularly important that the Supreme Court give consideration to the decision reached in this particular case.

The questions involved in this case are ones of general importance. The decision rendered affects all longshoremen and other harbor workers as well as their employers and insurance carriers. The decision can also affect other provisions and benefits granted under the Act.

The power to compromise disputed claims is of vital importance to the power and effective administration of the Act.

If certiorari is not granted in this case, Deputy Commissioners or judges and the courts, will not be in a position to allow and approve compromise settlements in proper cases involving death claims from this point forward.

II. SEVENTH CIRCUIT'S DECISION ON TWO IMPORTANT QUESTIONS OF FIRST IMPORTANCE WILL BECOME "LAW OF THE LAND" UNLESS REVIEWED BY THIS COURT.

An important question briefed and argued before the Seventh Circuit Court involved whether a hearing examiner—as well as any Court—had the right to approve a compromise settlement after the case rose above the level of the Deputy Commissioner. The court below, however, determined that no one had the right to approve a lump sum compromise settlement in a death claim, thereby creating an even more important question to be determined by this Court. The basis of the lower court's decision was not argued in the briefs or oral argument originally submitted to it.

Prior to this time claimants, employers, insurers, their respective counsel, and the Labor Department had all believed — and acted on the belief — that the Secretary of Labor, prior to the Amendment to the Act of 1972 and the Deputy Commissioner, subsequent to 1972, had the power to approve lump sum settlements in death benefit cases pursuant to Section 8(i)(A) of the Act, 33 U.S.C. §908(i)(A).

The 1972 Amendments gave to hearing examiners (now administrative law judges) "all powers, duties, and responsibilities vested by [the Act] on October 27, 1972, in the Deputy Commissioners with respect to 'all hearings respecting a claim arising under the Act, 33 U.S.C. §919 (d). All hearings are now to be conducted in accordance with Section 554 of the Administrative Procedure Act, 5 U.S.C. §554. Petitioners contend in the proceeding below

that Section 19(d) of the Amended Act, 33 U.S.C. §919 (d) gave the administrative law judge the authority to approve lump sum settlements of controverted death claims arising under the Act. This authority was believed by all to be at least vested in the Deputy Commissioner.

III. STATUS OF DEATH CASES PREVIOUSLY SETTLED WITH DEPARTMENT'S APPROVAL IS IN DOUBT.

The decision of the Seventh Circuit Court at least creates a cloud upon, if it does not in fact void, all of the previously settled death claims approved by the Department of Labor. The decision leaves the door open for any of the parties to previous settlement to re-open the question of whether benefits were or were not payable under the Act. Re-opening and trial of such cases, as might be required under this decision, could well result in financial hardship to survivors who have received and spent the proceeds of the settlement and who might thereafter be required to repay those amounts.

IV. IF LEFT TO STAND, THE LOWER COURT'S DECISION WILL OF NECESSITY INEVITABLY LEAD TO INCREASED LITIGATION.

Administrative agencies and courts are already overburdened with litigated cases. The lower court's decision, if allowed to stand, will increase that burden. By precluding settlements in appropriate death claims, the decision will force the parties to litigate many claims that should be settled. The death claims can involve fact and legal questions, medical questions and combinations of all three. In cases where the claimant has a "good" — but not perfect — case, the insurance carrier might well be inclined

to make a substantial settlement. On the other hand, if it is an all or nothing situation as the court below requires, the insurance carrier would have nothing to lose by litigating it. On the other hand, where the claimant has a weak case, he or she has nothing to lose through litigation where minimal settlements are precluded — as they now are.

The decision below by increasing litigation in death claims will correspondingly serve to delay the payment of benefits to surviving beneficiaries in disputed cases where settlement would otherwise quickly terminate the dispute and result in prompt payment of an agreed amount.

V. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS CONTRARY TO THE PRINCIPLES OF STATUTORY CONSTRUCTION IMPLICIT IN PRIOR DECISIONS OF THIS COURT.

The decision of the Court below turns on the strict interpretation given by that court to the words "injured employee entitled to compensation" in Section 8(i)(A) as excluding from settlement considerations beneficiaries of an employee in death claims. Apparently, the Court below was of the view that the Act is to be strictly confined to its "precise statutory limitations" (App. D, p. 19a), a view clearly erroneous in light of the decisions of this Court.

In *Voris v. Eikel,* 346 U.S. 328, 98 L. Ed. 5, 74 S. Ct. 88 (1953), this Court stated that with respect to statutory construction, the Longshoremen's Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." (346 U.S.

at 328). Quoted with approval, *Reed v. S. S. Yaka,* 373 U.S. 410, 10 L. Ed. 2d 448, 83 S. Ct. 1349 (1963), rehearing denied 375 U.S. 872, 11 L. Ed. 2d 101, 84 S. Ct. 27.

Consideration of other decisions of this Court clearly demonstrates that this Court will not blindly adhere to the superficial meaning of provisions of the Act which achieve a result which is harsh, absurd or incongruous.

The rule that a test of reasonableness is to be applied in interpreting a statute was again applied in *Reed v. S. S. Yaka, supra,* when this Court held that the exclusion liability of the employer to the employee in Section 905 was not to be applied in those circumstances where a longshoreman was employed directly by the shipowner and the employee was to have the same rights against the shipowner employer as did an employee of an independent contracting stevedore against a third party shipowner. In construing this statutory language, Mr. Justice Black said "Only blind adherence to the superficial meaning of a statute" would permit the Court to deny the injured longshoreman the same rights which a longshoreman employed by an independent contracting stevedore had against the vessel on which the injury occurred. (373 U.S. at p. 415) To rule any other way "would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen. . . Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company. As we said in a slightly different factual context, 'All were subjected to the same danger. All were entitled to like treatment under law.' (quoting from *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 413, 98 L. Ed. 143, 74 S. Ct. 202 (1953)" 373 U.S. at p. 415.

Likewise, in this case, a dependent of a deceased employee should be entitled to the same treatment as the injured employee. This is particularly true since Congress has never amended the Act to specifically prohibit the Department of Labor from approving lump sum death benefit settlements, despite the longstanding administrative policy of allowing such settlements. To now allow only an employee the opportunity to enter into a settlement, and to preclude a surviving spouse from the same right is a result which is manifestly harsh and injust.

To the effect that this Court will not apply a "literal" construction to a statute so as to give the statute a harsh or unreasonable result see *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.,* 350 U.S. 124, 100 L. Ed. 133, 76 S. Ct. 232 (1956); *Jackson v. Lykes Bros. Steamship Co., Inc.,* 386 U.S. 731, 18 L. Ed. 2d 488, 87 S. Ct. 1419 (1967); *Czaplicki v. S. S. Hoegh Silvercloud,* 351 U.S. 525, 100 L. Ed. 1387, 76 S. Ct. 946 (1956).

In view of the proper construction that should be given this Act, the decision below should be reviewed because the result reached is harsh, absurd and illogical. The statutory definition of "injury" includes "death," 33 U.S.C. §902(2), and the statutory definition of "compensation", 33 U.S.C. §902(12), includes money payable to dependents of an employee and also funeral benefits. When these definitions are applied to Section 8(i)(A), 33 U.S.C. §908(i)(A), that section would read substantially as follows:

> "Whenever the deputy commissioner determines that it is for the best interest of an 'injured or deceased' employee entitled to the 'money benefits payable to an employee or to his dependents . . . including funeral benefits,' he may approve agreed settlements."

By limiting this section to employees and not other dependents, the court below clearly has reached a result which is not consistent with the liberality of the Act itself. It is harsh because it denies the survivors of an employee the same rights the deceased was given under the Act.

Furthermore, such a result is absurd because it leads to inconsistencies within the Act itself. For example, Section 21(b)(3), 33 U.S.C. §921(b)(3), authorizes the Benefits Review Board "to hear and determine appeals . . . from decisions with respect to claims of employees . . ." If the term "employees" does not include dependents of a deceased employee, then the BRB has no statutory authority to review the order of the administrative law judge. Likewise, the Court below would have no jurisdiction because Section 21, which is the sole source of jurisdiction for the Court below, gives power only to review "a final order of the Board." 33 U.S.C. 921 (c).

One other example will suffice. Section 15(b) provides:

> "(b) No agreement by an employee to waive his right to compensation under this chapter shall be valid." 33 U.S.C. §915(b)

This Section mentions only an employee and is silent respecting a surviving spouse or other beneficiary. If the decision below is allowed to stand, then only an employee, not his beneficiaries, would be prohibited from having their right to compensation and settlement with a surviving spouse could be obtained outside the Act by obtaining a waiver of rights. This would obviate the need for approval by the deputy commissioner, administrative law judge, or anyone else. No act that we know of, including the Longshoremen's Act, permits settlement without approval of some appropriate authority charged with administering or adjudicating claims under the Act.

VI. ALTHOUGH PRESENTED BELOW THE COURT FAILED TO RULE ON ISSUE OF PAYMENT OF ATTORNEY'S FEES.

Although this issue has been raised throughout the appellate procedure at all levels, the Court below failed to determine whether an amendment to a statute (Section 28(a) of the Act, 33 U.S.C. §928(a)) can shift the legal liability for claimant's attorney fees from the claimant to the insurer where injury occurred prior to the amendment and the rights of the parties were established by the earlier law.

CONCLUSION

The decision of the Court below leaves the "harsh, absurd and incongruous" result of remitting all widows, and survivors in disputed death claims "to a roll of the dice, an all or nothing situation." (opinion below, App. D, p. 18a) The action taken by the Department will hereafter preclude the possibility of this serious question being presented to this Court for determination. Under these circumstances it is vitally important that the Court exercise its discretion to hear and determine this case.

Respectfully submitted,

CARL N. OTJEN
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VAN ERT, S.C.
of Counsel

Attorneys for Petitioners

APPENDIX A

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210

In the Matter of

MRS. DOROTHY C. ALLEN — Claimant

vs.

S. H. DU PUI COMPANY — Employer

LIBERTY MUTUAL INSURANCE COMPANY — Carrier

Before: EDWIN S. BERNSTEIN
Administrative Law Judge

DECISION AND ORDER

Case No. 73-LHCA-114
(Formerly 10-3392)

Upon consideration of the stipulation entered into between the parties at the hearing held in this case on October 18, 1973, the following Findings of Fact and Award are hereby entered:

FINDINGS OF FACT

(1) The claimant, Dorothy C. Allen, was born on January 18, 1917; resides at 9536 West Lisbon Avenue, in the City and County of Milwaukee, State of Wisconsin; is a housewife by occupation; and is the widow of Oscar H. Allen.

(2) During his lifetime, and on November 6, 1972, Oscar H. Allen was employed as a grain trimmer by S. H. Du Pui Company at the Jones Island Docks in the City and County of Milwauke, State of Wisconsin. On November 6, 1972, Oscar H. Allen was employed aboard a vessel, the S. S. *Martha Hindman,* owned and operated by Hindman Transportation Company, whose offices are located at Owen Sound, Ontario, Canada. That said ship was docked at the Jones Island Docks for the purpose of unloading grain. That on said November 6, 1972, the leg of a grain elevator being lifted out of the hold of said vessel became wedged under a hatch coaming. Oscar H. Allen was in the process of dislodging the leg when one of the vessel's crewmen released a line that was holding the vessel in position, the vessel moved and Oscar H. Allen was wedged between the leg of the grain elevator and the hatch coaming.

(3) That as a result of the accident, Oscar H. Allen suffered severe and internal injuries which were diagnosed at St. Luke's Hospital in Milwaukee, Wisconsin as (a) a focal capsular laceration of the spleen with parenchymal hemorrhage and (b) focal laceration of the small bowel with hemorrhage. The attending physician, Dr. Michael A. Polacek, states that Mr. Allen entered the hospital with "massive abdominal trauma and hemorrhage secondary to same due to a ruptured viscus, small bowel mesentery and spleen."

(4) Oscar H. Allen passed away on November 11, 1972, at St. Luke's Hospital. The death certificate states the cause of death as cardio-pulmonary failure due to anemia following crushing abdominal injuries following bowel resection and splenectomy due to accident—pinned by grain elevator while at work.

(5) The attending physician, Dr. Michael A. Polacek, if called as a witness, would testify that at the time Oscar H. Allen was admitted to the hospital, he was in critical condition because of the massive blood loss and refusal by both the patient and the family to be given needed blood transfusion on the basis of religious preference. That his religious wishes were followed, although several times an attempt was made, both with the family and the patient, to circumnavigate these wishes and to give the patient blood. That the patient succumbed from his injuries on November 11, 1972, five days after the initial trauma and surgery. That said doctor would testify to reasonable medical certainty, although the patient's prognosis was guarded, he would have survived if blood replacement could have been given, and that his recovery prognosis, on the basis of the injury, would have been considered good, although his disability most likely would have exetended two to three months.

(6) Oscar H. Allen, a Jehovah Witness, accepted medical treatment but refused administration of a blood transfusion or transfusions on religious grounds, and that he was conscious and coherent up to within 20 minutes before his demise. That he consistently, during the entire period he was in the hospital, refused to permit blood replacement by means of transfusion.

(7) That the claimant, Dorothy C. Allen, and her two adult daughters, Janice Allen and Phyllis Allen, are also members of the Jehovah Witness faith, and that, if called upon to testify, would testify that they, too, if their consent to a blood replacement by transfusion were needed, would have refused to give such consent on religious grounds.

(8) That at the time of the demise of Oscar H. Allen, claimant, Dorothy C. Allen, was 56 years of age and her life expectancy, according to the American Mortality Table, would be 16.72 years in accordance with Section 314.07 of the Wisconsin Statutes. That, as the widow of Oscar H. Allen, claimant would be entitled to a weekly sum of $36.75. That the annual compensation, based on a weekly sum of $36.75, would be the sum of $1,911.00. The calculation of a lump sum settlement utilized in the American Experience of Five Percent Single Life Table is 10.95 years, and that the total present value of the sum of $36.75, based upon the life expectancy of the claimant, is the sum of $19,291.55.

(9) That the claimant, Dorothy C. Allen, was examined by a physician in behalf of the employer and the carrier; that said physician, if called to testify, would testify that the claimant is suffering from hypertension and diabetes, and that, in his opinion, her life expectancy would be less than that of 16.72 years, based upon the aforesaid life expectancy tables.

(10) That the carrier, in behalf of the employer and with the consent of the employer, has offered the sum of $11,250.00 to the widow in full and final settlement of the widow's compensation death benefit, which said settlement has been accepted by the claimant and approved by the attorneys for the claimant; and I find as

CONCLUSIONS OF LAW

(1) That on November 6, 1972, Oscar H. Allen was employed by a grain trimmer by the employer, S. H. Du Pui Company; and that during the course of his employment, he was severely injured and taken to a hospital where he died five days later.

(2) That the decedent, Oscar H. Allen, received and accepted medical treatment, except for a blood transfusion which he rejected on religious grounds. That such refusal of a blood transfusion was his decision and not the decision of the widow, although she supported his decision.

(3) That Section 9 of the Longshoremen's Act grants a right of action relating to death benefits payable to dependents; that said right is a new cause of action separate and apart from the injured employee's right to compensation; that, as the Longshoremen's Act is remedial, the same should be broadly or liberally interpreted and that any doubt should be resolved in favor of the injured employee or his dependent family.

(4) That the said settlement of $11,250.00 is fair and equitable, has been accepted by the widow upon advice of her counsel, and that the same is herewith and hereby approved.

COMPENSATION ORDER

1. The Employer and Carrier shall pay to Claimant the sum of $11,250.00.

2. A fee of $2,264.75, including $14.75 for disbursements, is considered reasonable for legal services rendered to Claimant by Becher, Kinnel, Doucette, Mattison, and shall be paid out of the award.

/s/ Edwin S. Bernstein
Edwin S. Bernstein
Administrative Law Judge

Dated: November 19, 1973
Washington, D.C.

APPENDIX B

UNITED STATES DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Petitioner

vs.

S. H. DU PUI COMPANY
and
LIBERTY MUTUAL INSURANCE Co.
Respondents

DECISION OF THE BOARD
BRB No. 74-101

Before: Washington, Chairperson, Hartman and Miller, Members.

This is an appeal by the Director, Office of Workmen's Compensation Programs, from the compensation order of an administrative law judge which approved a settlement agreement between Dorothy C. Allen, the claimant, and the employer and carrier, respondents herein, arising under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. §901 *et seq.*

Claimant is the widow of an employee whose death allegedly resulted from an injury incurred while working in employment covered by this Act. Decedent, a Jehovah's Witness, accepted medical treatment but rejected blood transfusions based on religious beliefs. It was stipulated that the attending physician would testify that decedent would have made a good recovery had he

accepted these transfusions. This refusal was the basis for the respondent's controversion of the claimant's right to receive death benefits.

After the case was transferred for hearing to the Office of the Chief Administrative Law Judge, but before the date set for the hearing, respondent offered claimant the sum of $11,250.00 in settlement of her claim. Claimant was willing to accept this offer and at the scheduled hearing both parties stipulated to the facts and sum to be paid. The administrative law judge accepted these facts and sum and issued a compensation order. The order also provided that claimant's attorney's fee be paid out of this approved sum.

Petitioner asserts, among other things, that the settlement agreement amounts to a withdrawal of controversion and therefore, under 20 C.F.R. §702.351, the administrative law judge should have halted the proceedings and returned the case to the deputy commissioner for proper disposition of the case. *See* 20 C.F.R. §702.315.

The Board cannot agree with petitioner that a settlement agreement is tantamount to a withdrawal of controversion. Section 702.351, 20 C.F.R., requires that a signed statement withdrawing controversion be submitted to the administrative law judge in order to effectively withdraw one's controversion of the contested issues. Such a statement was never submitted by either party. A settlement offer by an employer is not an admission of liability or a withdrawal of controversion but is merely an expeditious method of avoiding costly litigation which may result in an unfavorable outcome. The respondents in their brief before this Board state categorically that they have not withdrawn their controversion in this case.

Nevertheless, we do find that the administrative law judge lacked authority since the compensation order, in effect, constituted approval of a lump sum settlement. Section 8(i)(A) of the Act, 33 U.S.C. §908(i)(A), gives the authority to approve settlements to the deputy commissioner. Prior to the 1972 amendments, Section 8(i)(A) allowed the deputy commissioner to approve settlements only "with the approval of the Secretary." However, the requisite approval of the Secretary was deleted in the amendments of 1972, leaving the power to approve such settlement agreements with the deputy commissioner.

The respondents urge the Board to find that the Director, Office of Workmen's Compensation Programs, is not a party adversely affected or aggrieved by a decision and therefore not entitled to appeal the administrative law judge's decision in this case. "Party in interest" is defined in 20 C.F.R. §801.2(a):

> (10) "Party" or "Party in interest" means the Secretary or his designee and any person or business entity aggrieved or directly affected by the decision or order from which an appeal to the Board is taken.

The Director is responsible for the proper administration of the Act and is "adversely affected" pursuant to 20 C.F.R. §802.201(a), whenever an administrative law judge makes an error in a legal determination under the Act.

The Board finds that the Director, Office of Workmen's Compensation Programs, is the designee of the Secretary and upholds his right to bring an appeal as a "party in interest adversely affected."

The Board vacates the order of the administrative law judge which, in effect, approved a lump sum settlement.

Accordingly, we remand the case to the administrative law judge for referral to the deputy commissioner for appropriate action pursuant to Section 8(i)(A) of the Act.

/s/ Ruth V. Washington
Ruth V. Washington, Chairperson

/s/ Ralph M. Hartman
Ralph M. Hartman, Member

/s/ Julius Miller
Julius Miller, Member

Dated this 17th day
of June 1974.

APPENDIX C

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

BRB No. 74-101
ORDER

Further consideration of the question of attorney's fee is unnecessary as the compensation order of the administrative law judge has been vacated and that question is now before the deputy commissioner, therefore, the respondents' request for reconsideration is hereby DENIED

/s/ Ruth V. Washington
Ruth V. Washington, Chairperson

/s/ Ralph M. Hartman
Ralph M. Hartman, Member

/s/ Julius Miller
Julius Miller, Member

Dated this 10 day
of July 1974.

APPENDIX D

In the
United States Court of Appeals
For the Seventh Circuit

No. 74-1666

S.H. DU PUY and LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for Review of an Order of
the Benefits Review Board
United States Department of Labor

ARGUED APRIL 7, 1975 — DECIDED AUGUST 7, 1975

Before PELL and SPRECHER, *Circuit Judges,* and PERRY, *Senior District Judge.**

PELL, *Circuit Judge.* Oscar Allen was severely injured on November 6, 1972, while employed by S.H. Du Puy Company (Du Puy)[1] as a grain trimmer at the Jones Island Docks in Milwaukee, Wisconsin. Allen received

* Senior District Judge Joseph Sam Perry of the Northern District of Illinois is sitting by designation.

[1] The employer was denominated as the S.H. Du Pui Company in the administrative proceedings of which review is sought in this court. Here, however, the employer is also referred to as DePui and Du Puy. There being no suggestion that any of the various designations refer to other than the one and same company and assuming that the company's counsel in its last briefing word should be in the best position to know the correct spelling, we are utilizing Du Puy.

medical attention and was hospitalized. He refused blood transfusions for religious reasons and died November 11, 1972. Liberty Mutual Insurance Co., the insurance carrier for Du Puy, gave notice that it would controvert the case since Mr. Allen refused to accept reasonable "medical treatment." Mrs. Allen made a claim for death compensation for herself by notification. A conference with Mrs. Allen, Liberty Mutual, and a deputy commissioner for the United States Secretary of Labor was held in May 1973. The deputy commissioner concluded that there was a necessity for an evidentiary hearing which "will be held by an Administrative Law Judge of the U.S. Department of Labor, who will follow the Administrative Procedure Act." The hearing was scheduled for October 1973 before the Administrative Law Judge (ALJ).

At the hearing the parties informed the ALJ that a settlement agreement had been reached. The ALJ entered an order based on this agreement, which provided for a lump sum payment. Attorney's fees were to be paid from the award. The Director, Office of Worker's Compensation Programs, Department of Labor, appealed this order to the Benefits Review Board, which vacated the Compensation Order on the grounds that a settlement could only be approved by a deputy commissioner. The board declined to rule on the question of attorney's fees raised before the board.

Du Puy and Liberty Mutual jointly petition this court pursuant to 33 U.S.C. §921(c) to set aside the decision of the Benefits Review Board and to reinstate the compensation order filed by the ALJ. In their briefs and during oral argument in this court the parties have principally addressed themselves to two issues: 1) whether the ALJ had the authority and power to approve the settlement of the death claim and 2) whether attorney's fees should have been assessed in addition to the award by the ALJ, assuming he had the power to make an award.

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, was enacted to provide the type of coverage generally denominated as workmen's compensation to certain designated employees of

whom Allen was one.[2] In furtherance of the protective purpose of the Act, other provisions specified that no agreement by an employee to waive his right to compensation would be valid and that no assignment, release, or commutation of compensation or benefits would be valid except as provided in the Act. 33 U.S.C. §§ 915(b), 916.[3] These sections have operated as a general bar to settlements. See generally, *Henderson* v. *Glens Falls Indemnity Co.*, 134 F.2d 320 (5th Cir. 1943), *cert. denied*, 319 U.S. 756; *Lumber Mutual Casualty Insurance Co.* v. *Locke*, 60 F.2d 35 (2d Cir. 1932).

While the underlying policy of the Act generally precluded disposition of these cases by way of compromise and settlement, Congress did provide an exception. That exception, the only one of which we are aware in the Act prior to the amendments of October 27, 1972, was contained in 33 U.S.C. § 908(i), which provided that if the deputy commissioner determined that it is for the best interests of an injured employee entitled to compensation, he could, with the approval of the Secretary of Labor, approve agreed settlements in cases involving temporary partial disability and certain cases involving permanent partial disability.[4]

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[2] "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C. § 903. This section has certain exclusions from coverage not here material.

[3] These sections of the Act, which have remained unamended since the original enactment in 1927, read as follows:

"(b) No agreement by an employee to waive his right to compensation under this chapter shall be valid." 33 U.S.C. § 915(b).

"No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived." 33 U.S.C. § 916.

[4] Specifically, the deputy commissioner's authority was limited to cases under subdivision (c)(21) and subdivision (e) of § 908. Those subdivisions, which were unchanged by the 1972 amendments, read as follows:

"(21) Other cases: In all other cases in this class of disability the compensation shall be 66 ⅔ per centum of the difference between his average weekly wages and his wage-earning capacity

In 1972, § 908(i) was amended to allow the deputy commissioner to approve agreed settlements whenever he determined that it is for the best interests of the injured employee. The reference to certain subdivisions and the reference to approval of the Secretary were eliminated.[5] The House Report accompanying the bill

[4] (Continued)

thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest."

"(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years."

It is to be noted that in the case of permanent partial disability the "other cases" followed twenty specific types of injuries, and in practically all cases the amount of compensation was exactly spelled out, *e.g.*, in the case of a fourth finger lost the compensation was fifteen weeks. In the "other cases" situation, subdivision (c)(21), a factor was "wage earning capacity thereafter" which would appear to call for the determination of a judgmental figure. The same reference to "wage earning capacity after the injury" appears in subdivision (e). It would appear prior to the 1972 amendments that the deputy commissioner's discretion was basically limited to the situation where the uncertain factor of post-accident earning capacity entered the picture and that in other instances the claim was not subject to compromise or settlement but it was a matter of all or nothing.

[5] The full text of the amended subdivision is as follows:

"(i)(A) Whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 915(b) and section 916 of this title: *Provided*, That if the employee should die from causes other than the injury after the deputy commissioner has approved an agreed settlement as provided for herein, the sum so approved shall be payable, in the manner prescribed in this subsection, to and for the benefit of the persons enumerated in subsection (d) of this section.

(B) Whenever the Secretary determines that it is for the best interests of the injured employee entitled to medical benefits, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such medical benefits, notwithstanding the provisions of section 916 of this title: *Provided*, That if the employee should die from causes other than the injury after the Secretary has approved an agreed settlement as provided for herein, the sum so approved shall be payable, in the manner prescribed in this subdivision, to and for the benefit of the persons enumerated in subdivision (d) of this section.

stated: "Subsection [90]8(i)(A) provides that the deputy commissioner. Board, or Court may approve a settlement discharging an employer from liability for compensation if he deems it to be in the best interest of the employee." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., 3 *U.S. Code Congressional and Administrative News* at 4698, 4720 (1972).

We note one other amendment to the Act which was included in the 1972 amendments. Section 919(d) had provided for the presentation of evidence at a hearing to be conducted by the deputy commissioner as provided for in subdivisions (a) through (c) and also that the claimant and employer could be represented at the hearing by any person authorized in writing. This subdivision was amended to read as follows:

> "(d) Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that Title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners."

Section 554 is the adjudication section of the Administrative Procedure Act. In addition to providing that hearings are to be held in accordance with §§ 556 and 557, section 554 provides, *inter alia*, as follows:

> "(c) The agency shall give all interested parties opportunity for —
>
> (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
>
> (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title."
>
> 5 U.S.C. § 554(c).

The powers and duties of a hearing examiner or an administrative law judge are set forth in Section 556 which provides in part:

> "(b) . . . . This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specifically provided for by or designated under statute. . . .
>
> "(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may —
>
> . . . .
>
> "(6) hold conferences for the settlement or simplification of issues by consent of the parties;" 5 U.S.C. 556 (b), (c).

The foregoing is the context of the issue argued vigorously both in the briefs and at oral argument of the parties and the amicus.[6] The petitioners and the amicus contend that it is clear that the hearing examiner, now administrative law judge, is to conduct the hearing and is vested in connection with the hearing not only in the Administrative Procedure Act but particularly by the Longshoremen's and Harbor Workers' Compensation Act with the "powers, duties, and responsibilities" theretofore reposing in the deputy commissioner. This would, it is asserted, perforce include the duty to pass upon agreed settlements and to approve such settlements if in the best interest of the claimant. The governmental respondent devotes equally vigorous argument to the effect that the power of approving settlements still remains solely with the deputy commissioner, and would seem to be saying that the amended section 919(d) does not mean what it rather clearly seems to say. It is obvious that all who appeared before us desired us not only to dispose of this issue but also that pertaining to the allowance of attorney fees. Scant attention was paid either in the briefs or at oral argument to a footnote in the respondent's brief, which upon further analysis

[6] The court permitted the West Gulf Maritime Association to file a brief and to participate in oral argument on an amicus curiae basis. That Association supported the position of the petitioners.

we hold to be dispositive of the case before us.[7] The footnote states the matter sufficiently succinctly and, in our opinion, so correctly that we set it forth as a part of this opinion:

> "The language and legislative history of section 8 (i)(A), as originally enacted, Act of June 25, 1938, C. 685, § 5, 52 Stat. 1165, and as amended, raise doubts that any proposed settlement of a death claim, such as in the instant case, can be approved even by a deputy commissioner. Section 8(i)(A) both before and after the 1972 Amendments to the Act, P.L. 92-576, 86 Stat. 1251, requires that the proposed settlement be in the 'best interest of the *injured employee.*' That Congress intended to limit this statutory authorization of settlements to the claims of the 'injured employee' is clear. As originally enacted, approved settlements were limited to cases which came within sections 8(c)(21) and 8(e), 33 U.S.C. 908(c)(21) and 908(e), *i.e.*, cases of permanent partial disability and temporary partial disability. The very language of section 8(i)(A), as originally enacted, therefore, did not authorize the settlement of death claims.
>
> "Although section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, 1264, which amended section 8(i), no longer limits approval of settlement to cases coming within sections 8(c)(21) and 8(e), amended section 8(i)(A) retains the requirement that the settlement be in 'the best interests of the injured employee.' Had Congress intended to permit the settlement of all claims coming within the provisions of the Act, including claims for death benefits, Congress could have substituted the phrase best interest of the 'person entitled to compensation' for 'best interest of the injured employee.' *Compare* section 14(j), 33 U.S.C. 914(j), which authorizes the deputy commissioner to approve the lump sum payment and commutation of an award. In calculating the com-

[7] While we ordinarily would not have devoted the space that we have to a non-dispositive issue, we have deemed it necessary in the present instance for the purpose of showing the statutory background in which any claimant in the workmen's compensation area must operate.

> mutation the deputy commissioner is directed to consider 'The probability of the death of the injured employee or *other persons entitled to compensation.*' 33 U.S.C. 914(j).
>
> "In view of the foregoing, it is doubtful that either an administrative law judge or a deputy commissioner can approve the proposed settlement in this case and the question presented to this Court in this appeal may be merely academic." [Emphasis in the original.]

If the petitioners and amicus have a refutation of what was expressed as a doubt by the respondent, it was not provided to us. While the ALJ may well have the power to approve a settlement agreement in the case of an injured employee, we do not have such a case here. We are dealing with a claimant who became such by virtue of the death of an employee. Her case is not lodged under section 908 but under section 909. That section is silent on the matter of settlement. The amendment of 908, despite being included in the section relating to injured employees, might have been broadened to include all claimants, but it did not do so. Subdivision (i) still only relates to "an injured employee."

It is not difficult to conceive of many policy arguments which favor at least someone having the authority to approve an agreed settlement of the claim of a person entitled under section 909. In the particular case before us, the widow, who was represented by apparently competent counsel of her own choice, agreed to a settlement for a lump sum which would have netted her approximately $9,000.00. The decision to settle was made in the light of medical support for the belief that the employee would not have died if he and his family, including the claimant, had been willing to permit a blood transfusion. The total settlement would have been more than half of the amount that would have been reached based upon the decedent's life expectancy. The claimant's life expectancy was less than normal. Yet, apparently as the statutory scheme stands, she and all similar claimants are remitted to a roll of the dice, an all or nothing situation: and nearly three years after the death of her husband her claim is still pending.

Further, general policy is in favor of settlement of litigation by compromise and settlement procedures. See the discussion of the general policy by Judge Sprecher in speaking for this court in *Clarion Corporation* v. *American Home Products Corporation,* 494 F.2d 860, 863 (7th Cir. 1974), *cert. denied,* 419 U.S. 870.

It is not our province, however, to write legislation that Congress either overlooked or designedly chose not to write; *a fortiori,* this is true where the rights of all claimants, direct or derivative, are so specifically dependent upon, and pursuant to, precise statutory limitations as is the case in the law of workmen's compensation. The hornbook law in this area is set forth in the caption notes of 100 C.J.S. Workmen's Compensation § 406 (1958): ". . . . Generally an agreement as to compensation must be approved by a court, board, or commission. . . . A court or commission has only such power to approve agreements as is conferred by statute, and has no power to approve an agreement which does not conform to the statute. . . . There should be a compliance with statutory requirements in proceedings for approval of compensation agreements."

Therefore, we reluctantly conclude that neither the deputy commissioner nor the ALJ had authority to approve the settlement. We can conceive of no reason for Congress not giving the power to a responsible administrative agency. Thus far, however, it has not.

Because of our decision on the first issue, we do not determine whether attorney fees should be allowed in addition to an award or should come from the award.

For the reasons hereinbefore set out, we hold that the Benefits Review Board action in vacating the order of the ALJ was correct, although not for the reasons given by the Board, the correctness of which we have not had to determine. Accordingly, we deny the petition to set aside the Board decision.

SPRECHER, *Circuit Judge*, concurring. I concur in the result but not in the statements in the majority opinion which are not necessary to reach the result.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

September 3, 1975

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. JOSEPH SAM PERRY, Senior District Judge*

S. H. DU PUI and LIBERTY MUTUAL INSURANCE COMPANY, Petitioners,		
No. 74-1666	vs.	Petition for Review of an Order of the Benefits Review Board, United States Department of Labor
DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondent.		

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

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* Senior District Judge Joseph Sam Perry of the Northern District of Illinois is sitting by designation.

APPENDIX F

33 U.S.C. §908(i)(A) as amended, Oct. 27, 1972, Pub. L. 92-576 §20(a), 86 Stat. 1264

§908 COMPENSATION FOR DISABILITY

(i)(A) Whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 915(b) and section 916 of this title: PROVIDED, That if the employee should die from causes other than the injury after the deputy commissioner has approved an agreed settlement as provided for herein, the sum so approved shall be payable, in the manner prescribed in this subsection, to and for the benefit of the persons enumerated in subsection (d) of this section.

33 U.S.C. §919(d) as amended, Oct. 27, 1972, Pub. L. 92-576 §14, 86 Stat. 1261

§919 PROCEDURE IN RESPECT OF CLAIMS

(d) Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that Title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners.

33 U.S.C. §928(a), as amended, Oct. 27, 1972, Pub. L. 92-576, §13, 86 Stat. 1259

§928 FEES FOR SERVICES — ATTORNEY'S FEE; SUCCESSFUL PROSECUTION OF CLAIM.

(a) If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

No. 75-776

In the Supreme Court of the United States

OCTOBER TERM, 1975

S. H. DU PUY AND LIBERTY MUTUAL INSURANCE COMPANY, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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CITATIONS

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11a-20a) is reported at 519 F. 2d 536.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1975. A timely petition for rehearing was denied on September 3, 1975 (Pet. App. 21a). The petition for a writ of certiorari was filed on November 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether death benefit claims under the Longshoremen's and Harbor Workers' Compensation Act may be compromised by settlement.

STATUTES INVOLVED

Section 8 of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1264, 33 U.S.C. (Supp. IV) 908, provides in pertinent part:

> Compensation for disability shall be paid to the employee as follows:
>
> * * * * *
>
> (i)(A) Whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 15(b) and section 16 of this act: *Provided,* That if the employee should die from causes other than the injury after the deputy commissioner has approved an agreed settlement as provided for herein, the sum so approved shall be payable, in the manner prescribed in this subsection to and for the benefit of the persons enumerated in subsection (d) of this section[1].

Section 9 of the Act, as amended, 33 U.S.C. (Supp. IV) 909, provides in pertinent part:

> If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury,

---

[1]Prior to the 1972 Amendments (86 Stat. 1251), subdivision (i) provided in pertinent part (see 52 Stat. 1166):

> (i) In cases under subdivision (c)(21) and subdivision (e) of this section, whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may, with the approval of the [Secretary], approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 15(b) and section 16 of this Act * * *.

> the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
>
> (a) Reasonable funeral expenses not exceeding $1,000.
>
> (b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage * * *.

Section 15(b) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1434, 33 U.S.C. 915(b), provides:

> No agreement by an employee to waive his right to compensation under this Act shall be valid.

Section 16 of the Act, 33 U.S.C. 916, provides:

> No assignment, release, or commutation of compensation or benefits due or payable under this Act, except as provided by this Act, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

STATEMENT

The claimant-widow in this case, Dorothy Allen, filed a claim for death benefits under Section 9 of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 33 U.S.C. (Supp. IV) 909, on account of the November 11, 1972, death of her husband following a shipboard accident. The employer and its insurance carrier, petitioners herein, controverted the claim on the ground that the decedent's death was due to his refusal to accept a blood transfusion following the accident. The claim was referred to an administrative law judge for a formal hear-

ing, pursuant to Section 19(d) of the Act, as amended, 33 U.S.C. (Supp. IV) 919(d). Before the hearing, however, the claimant and the employer submitted a proposed settlement to the administrative law judge, who approved the settlement and entered a compensation order embodying its terms (Pet. App. 1a-5a).

The Director, Office of Workmen's Compensation Programs, Department of Labor, respondent herein,[2] filed an appeal with the Benefits Review Board, pursuant to Section 21(b) of the Act, as amended, 33 U.S.C. (Supp. IV) 921(b), and 20 C.F.R. Part 801. The Benefits Review Board determined that authority to approve a proposed settlement was vested only in deputy commissioners,[3] under Section 8(i) of the Act, as amended, 33 U.S.C. (Supp. IV) 908(i). The Board therefore vacated the order of the administrative law judge and remanded the case to the deputy commissioner for consideration of the appropriateness of the proposed settlement (Pet. App. 6a-9a).[4]

Thereafter the employer and insurance carrier filed a petition for review in the United States Court of Appeals for the Seventh Circuit, under Section 21(c) of the Act, as amended, 33 U.S.C. (Supp. IV) 921(c). The court of appeals affirmed the Benefits Review Board's action in vacating the order of the administrative law judge but did so on a different ground. The court held that death benefit claims are not subject to settlement under the Harbor Workers' Act. The court reasoned (Pet. App. 18a):

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[2]The Director has been delegated responsibility by the Secretary of Labor to administer the Longshoremen's and Harbor Workers' Compensation Act. 20 C.F.R. 701.201, 701.202, 701.203.

[3]Deputy commissioners are officials appointed by the Director, pursuant to Sections 39(b) and 40 of the Act, 33 U.S.C. 939(b) and 940, to administer the Act in the various compensation districts established thereunder. 20 C.F.R. 701.301(a)(7), 702.101.

[4]The Director did not urge, and the Board did not hold, that the Act precluded settlements of death benefit cases.

> While the ALJ may well have the power to approve a settlement agreement in the case of an injured employee [under 33 U.S.C. (Supp. IV) 908(i)], we do not have such a case here. We are dealing with a claimant who became such by virtue of the death of an employee. Her case is not lodged under section 908 [compensation for disability] but under section 909 [compensation for death]. That section is silent on the matter of settlement.

ARGUMENT

1. Petitioners assert that prior to the decision of the court of appeals in this case, the Department of Labor (or its deputy commissioners) approved a "significant number" of compromise settlements involving death benefit claims under the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, but that since that decision the department has ordered no further compromise agreements of death benefit claims (Pet. 5). Petitioners contend on this basis that, unless the petition for a writ of certiorari is granted in this case, the question whether there is authority under the Act to settle death benefits claims will never again be reviewable in the courts (Pet. 5-8). Neither the premise nor the conclusion is correct.

a. The Department of Labor advises us that, with the exception of a small number of settlements mistakenly approved by deputy commissioners since 1972 (see note 8, *infra*), no death benefit settlements have been approved from the inception of the Act in 1927 to the present day. From 1927 to 1938 the Harbor Workers' Act permitted no settlements of any kind. There was nothing in the Act providing for settlement, thus, settlements were prohibited by Section 16 of the Act, which provides that "[n]o * * * release * * * of compensation or benefits due or payable under the Act, except as provided by the Act, shall be

valid." In 1938 Congress authorized approval of settlement recommendations in appropriate cases involving two limited classes of disability claims—claims involving non-scheduled permanent partial disabilities and claims for temporary partial disabilities. See 33 U.S.C. (1940 ed.) 908(c)(21), 908(e), 908(i).[5] But no settlements were authorized for any other disability claims. See 33 U.S.C. (1940 ed.) 908(a), (b), (c), and (f). Nor was there any authority to settle death benefits claims under Section 9 of the Act. The regulations of the Department of Labor (which assumed administration of the Harbor Workers' Act in 1950)[6] confirmed the limited statutory authority for settlements under the Act. See 20 C.F.R. 31.26 (1961).

In 1972 Congress expanded the authority of the deputy commissioners to approve settlements, in appropriate cases, of *any* disability claim of an injured employee under Section 8 of the Act. (At the same time Congress removed the necessity for the deputy commissioner to obtain approval of such settlements by the Secretary.) See Section 20(a) of the 1972 Amendments, 86 Stat. 1264. However, Congress made no additions or amendments to Section 9 of the Act that would allow settlements of death benefit claims, although other modifications to Section 9 were made.[7] With respect to death benefit

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[5]The rationale for allowing settlements of these cases, involving compensation subject to readjustment over a long period of time, was to remove future uncertainty in cases where symptoms were subjective and where future rehabilitation could be affected by a later claim by the employer to reduce benefits. S. Rep. No. 1988, 75th Cong., 3d Sess. 6 (1938).

[6]Reorganization Plan No. 19 of 1950, 15 Fed. Reg. 3178, 64 Stat. 1271.

[7]Sections 5(d), 10 and 20(c)(2) of the 1972 Amendments, 86 Stat. 1253, 1257, 1265.

claims, the prohibition of Section 16 of the Act remained in effect.[8]

b. Nor is this case the only one that could present this Court with the opportunity to decide the question whether death benefit cases can be settled under the Act. If the parties in a future controverted death benefit case should be disposed to settle, any rejection of the settlement, for lack of statutory authority, would be a "final order" reviewable under 33 U.S.C. (Supp. IV) 921(c). Since the instant case is the first to consider the scope of Section 8(i) as amended in 1972, there is no need for the Court to review the issues at this time.

2. As is indicated above, the death benefit provision of Section 9 of the Act contains no authority to approve settlements, and Section 16 expressly prohibits settlement except as otherwise provided in the Act. That the authority to approve settlements appears only in the provision relating to disability benefit claims (Section 8), and not in the provision involving death benefit claims (Section 9), is evidence that Congress intended to distinguish between the two types of claims. Nothing in the language or

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[8]Because the 1972 Amendments authorized deputy commissioners to approve settlements of disability claims without further approval of the Secretary, the Secretary has lacked centralized control over settlements since 1972. But the Secretary has brought the court's decision in this case, the first case dealing with the scope of Section 8(i) since the 1972 Amendments, to the attention of the Department's regional offices to confirm (not to change) the Department's pre-existing position against approval of death benefit settlements. Inasmuch as there has been no past authority or practice in the Department to approve settlement of death benefit cases, petitioners err in claiming that the Department has merely acquiesced in the decision of the court of appeals.

legislative history of Section 8(i) indicates or suggests that the settlement authority it confers was also intended to apply to claims for death benefits under Section 9.

a. Petitioners contend (Pet. 11) that the "injured employee," in whose best interest a settlement may be approved under Section 8(i), should be deemed to include the statutory survivors of a deceased employee. But this contention ignores the fact that Section 8, by its express terms, relates only to "[c]ompensation for *disability*" (emphasis added). Thus whatever meaning the term "injured employee" may properly be given in other provisions of the Act,[9] Congress must be presumed to have used it in its literal sense in Section 8(i), as referring to the disabled claimant. Indeed, this reading is confirmed by the proviso of Section 8(i), which provides that if the "employee" dies *after* settlement has been approved, from causes *other than the injury*, the agreed sum is to be paid to his statutory survivors; this clearly manifests a congressional intent to make posthumous settlement unavailable where death results from the injury.

b. Petitioners also contend (Pet. 8-9) that a construction that would exclude settlements in death benefit cases should be avoided because it is contrary to a general policy in favor of settlements. But while settlement agreements are encouraged in most areas of the law, that is not the case with regard to workmen's compensation. Many States have statutes comparable to Sections 15(b) and 16 of the Harbor Workers' Act, prohibiting settlement of workmen's compensation benefits. See 3 Larson, *Workmen's Compensation Law* §§82.31, 82.32 (1973). At least one reason for these provisions is explained as follows:

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[9] *E.g.*, Sections 4 and 10(a)-(e), 33 U.S.C. 904 and 910(a)-(e).

> The public has ultimately borne the cost of compensation protection in the price of the product, and it has done so for the specific purpose of avoiding having the disabled victims of industry thrown on private charity or public relief. To this end, the public has enacted into law a scale of benefits that will forestall such destitution. It follows, then, that the employer and employee have no private right to thwart this objective by agreeing between them on a disposition of the claim that may, by giving the workman less than this amount, make him a potential public burden.
>
> * * * * *
>
> [T]he objective of the legislation * * * is to insure that those with truly compensable claims get full compensation. If there is doubt about the compensability of the claim, the solution is not to send the claimant away half-compensated, but to let the compensation board decide the issue. That is the board's job.

3 Larson, *supra*, at §§82.41, 82.42, citing *Nagy* v. *Ford Motor Co.*, 6 N.J. 341, 78 A. 2d 709, *Laukaitis* v. *Sisters of Charity*, 135 Mont. 469, 342 P. 2d 752, and *Southern* v. *Department of Labor & Industries*, 39 Wash. 2d 475, 236 P. 2d 548.

The same policy is reflected in Section 16 of the Act, invalidating any settlement agreements "except as provided in this Act." It is also reflected in the legislative development of the Act. No authority to approve settlements was granted under the original Act, as enacted in 1927; thereafter only limited settlement authority was permitted. In extending the settlement authority to all disability claims in 1972, Congress gave "careful consideration" to the recommendations made by the National Commission on State Workmen's Compensation Laws in its report issued on July 21, 1972. S. Rep. No. 92-1125, 92d Cong.

2d Sess. 2 (1972).[10] One of the Commission's recommendations was that compromise and release agreements be permitted "only rarely," to guard against deprivation of rights to benefits,[11] and to prevent the undermining of "an active workmen's compensation agency."[12]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1976.

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[10]The Commission was established under Section 27 of the Occupational Safety and Health Act of 1970, 84 Stat. 1616, 29 U.S.C. 676, to study state workmen's compensation laws to determine whether they provide an adequate, prompt, and equitable system of compensation.

[11]Report of the National Commission on State Workmen's Compensation Laws, p. 110 (1972).

[12]*Id.* at 109.

IN THE

Supreme Court of the United States

OCTOBER TERM 19___

NO. 75-776

S. H. DUPUY, EMPLOYER, and LIBERTY MUTUAL INSURANCE COMPANY, CARRIER,
Petitioners

v.

DIRECTOR OF OFFICE OF WORKMEN'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF ON BEHALF OF WEST GULF MARITIME ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CONSENT OF PARTIES

All of the parties in this case have given their written consent to the filing of the Brief *amicus curiae* in support of the Petition for Writ of Certiorari and such written consent has been filed with the Clerk.

STATEMENT OF INTEREST

The West Gulf Maritime Association is an organization composed of steamship owners, operators, agents, and independent stevedoring companies, totaling some 50 members. Its membership covers the geographical area from the Port of Lake Charles, Louisiana, on the east, to the Port of Brownsville, Texas, on the west. All of the members of the Association are employers of substantial numbers of employees who are covered for injuries and death by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901, *et seq. as amended,* (Supp. 1975), 86 Stat. 1265, (hereafter sometimes referred to as "the Act" or the "Longshoremen's Act"), the construction of certain provisions of which is sought by the Petition for Writ of Certiorari.

The West Gulf Maritime Association is vitally interested in the proper administration of the Longshoreman's Act and is particularly concerned that the agreed settlement procedure under the Act be administered in order to facilitate and encourage the resolution of controverted claims at every stage of the adjudicative process.

The Petition for Writ of Certiorari presently before the Court involves a decision of the United States Court of Appeals for the Seventh Circuit holding that there is no authority for the settlement of death claims under the Longshoremen's Act.[1] The Director of the Office of Workmen's Compensation Programs of the United States Department of Labor has given every indication that he and his office intend to follow this holding, not only in the Seventh Circuit, but on a national basis. As a result of the national application this decision is being given

1. The decision is reported at 519 F.2d 536 (7th Cir., 1975).

and its effect in virtually prohibiting the settlement of controverted death claims under the Longshoremen's Act, the members of the West Gulf Maritime Association are directly interested in this matter and are so situated to be an appropriate organization to file this *Amicus Curiae* Brief in order to acquaint the Court with the views of employers of employees covered by the Act in substantially all segments of the maritime industry regarding the important issues raised by this Petition for Writ of Certiorari.

QUESTIONS PRESENTED

This case presents two questions of first impression in this Court:

First, does the Longshoremen's Act, as amended, authorize agreed lump sum compromise settlements of death claims arising under the Act?

Second, does an Administrative Law Judge have the authority to approve agreed settlements of controverted claims arising under the Longshoremen's and Harbor Workers' Compensation Act?

INTRODUCTION

The approval of agreed settlements of controverted compensation claims arising under the Longshoremen's and Harbor Workers' Compensation Act is authorized by Section 8(i)(A) of the Act, 33 U.S.C.A. § 908(i)(A), *as amended,* (Supp. 1975), which provides in relevant part

> "When the Deputy Commissioner determines that it is in the best interest of an *injured employee entitled*

> *to compensation,* he may approve agreed settlements of the interested parties, discharging the liability of the employer for compensation, notwithstanding the provisions of § 915(b) and § 916 of this title. . ." [2]

The principal question presented to the Court of Appeals in this case was whether the Administrative Law Judge assigned to hear a controverted claim once the formal adjudicative stage of the administrative process was reached was vested with authority to approve agreed settlements by Section 19(d) of the Act, 33 U.S.C.A. § 919(d), *as amended* (Supp. 1975). However, the Court below did not reach this issue and focused on the phrase "injured employee entitled to compensation" contained in Section 8(i)(A) because of a footnote contained in the Director's Brief below expressing doubt that there is authority under the Act to settle death claims. This resulted in holding that Section 8(i)(A) does not authorize the approval of agreed settlements in death claims because the term "injured employee" does not specifically include deceased employees or their dependents. Significantly, even the Director's counsel, the Solicitor of Labor, did not make such a contention nor directly assert that the Court should reach any such result[3] and the issue was not briefed by any of the parties except in conjunction with Petitioners' Motion for Rehearing, which was denied.

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2. Section 15(b) prohibits an employee from waiving his right to compensation under the Act, 33 U.S.C. §915(b). Section 16 prohibits employees from signing and releasing their right to compensations, 33 U.S.C. §916.

3. We submit the Solicitor of Labor did not because of the absurdities which result when the interpretation made by the Court below of this term is applied in other sections of the Act. See full discussions, *infra*, pages 15 to 21.

It is submitted that the holding of the Court of Appeals, which places a strict interpretation on the words "injured employee entitled to compensation" as used in Section 8(i)(A) so as to exclude deceased employees and the beneficiaries of deceased employees is incorrect and should be taken on certiorari for review by this Court.

REASONS FOR GRANTING THE WRIT

1. The strict construction of the statutory language "injured employee entitled to compensation" is in conflict with and ignores this Court's reported holdings that the Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results."

The view of the Court below that the Longshoremen's Act is to be strictly confined to its "precise statutory limitations" [4] is in clear conflict with many decisions of this Court construing various provisions of the Act. If there is any principle of statutory construction which is beyond dispute, it is that the Longshoremen's Act, as this Court has repeatedly stated, "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results".[5] Significantly, none of this Court's decisions construing the Act were referred to or

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4. 519 F.2d at 541.

5. *Voris v. Eikel*, 346 U.S. 328 at 333, 74 S.Ct. 88, 98 L.Ed. 5, 10 (1953); *See also, Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956); *Czaplicki v. SS HOEGH SILVERCLOUD*, 351 U.S. 525, 76 S.Ct. 946, 100 L.Ed. 1387 (1956); *Reed v. Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448, *reh. den.* 375 U.S. 872, 84 S.Ct. 27, 11 L.Ed.2d 101 (1963). See full discussion *infra*, pages 8 to 12.

apparently considered by the Court below for guidance in reaching its conclusion.

2. The strict construction of the term "injured employee" completely ignores and is in direct conflict with the statutory definitions of the terms "injury" and "compensation" in the Act.

"Injury" is defined in the Act to mean "accidental injury or death. . ." [6] "Compensation" is defined as ". . . the money allowance payable to an employee or to his dependents. . ." [7] When these statutory definitions are placed in Section 8(i)(A) which authorizes agreed settlements of claims of ". . . an injured employee entitled to compensation. . .", Section 8(i)(A) authorizes agreed settlements of claims of ". . . an injured or dead employee entitled to the money allowance payable to an employee or his dependents. . .". Only by ignoring those definitions can the decisic n of the Court of Appeals below be sustained.[8]

3. When the same strict construction of the statutory language is applied to the same terms in other sections of the Act, not only do harsh and incongruous results occur, but some real absurdities as well.

These results include:

(a) The Court of Appeals divests itself of jurisdiction. The Court of Appeals is empowered by the Act to review only final orders of the Benefits Review Board, 33 U.S.C.A. § 921. The Board has juris-

6. 33 U.S.C.A. §902 (2)

7. 33 U.S.C.A. §902 (12)

8. See full discussion, *infra*, pages 13 to 15.

diction to hear appeals only "with respect to claims of employees", and as no mention is made of claims of dependents or beneficiaries, under the decision of the Court below no appeal is permitted in death cases and the Administrative Law Judge's approval of this settlement is final.

(b) Section 10 [9] of the Act on which the method of determining an injured employee's weekly wages on which his weekly compensation rate is based cannot be used in death cases, since like Section 8(i)(A), Section 10 only uses the terms "employee" or "injured employee" and never refers to or mentions an employee's dependents or beneficiaries.

(c) Section 15 [10] which prohibits "an employee" from waiving his right to "compensation" is invalidated as no mention is made of dependents or beneficiaries in Section 15.

(d) Section 4[11] which requires the employer to secure the payment of compensation (usually through insurance) to "employees" is also invalidated because no mention is made of dependents or beneficiaries.[12]

4. An immediate resolution of this issue is a matter of great importance in the immediate as well as future administration of the Act, and particularly so when it is

9. 33 U.S.C.A. §910

10. 33 U.S.C.A. §915

11. 33 U.S.C.A. §904

12. See full discussion, *infra*, pages 15 to 21.

extremely doubtful that there is any practical way to get this issue before another Court of Appeals so that a potential conflict in the Court of Appeals will result.[13]

5. The Court below, because of the manner in which it resolved this case, left untouched the decision of the Benefits Review Board which was under review holding that only the Deputy Commissioner has authority to approve agreed settlements and therefore neither Judges nor the Benefits Review Board nor the Court of Appeals, nor this Court have authority to approve agreed settlements under Section 8(i)(A) of the Act. 33 U.S.C.A. § 908 (i)(A), *as amended*. (Supp. 1975). Nevertheless, this issue is before the Court, as erroneously decided below, and should also be considered.[14]

ARGUMENT

REASON NO. 1: THE STANDARD OF CONSTRUCTION

The view of the Court below that the Longshoremen's Act is to be strictly confined to its "precise statutory limitations" is clearly erroneous. If there is any principle of statutory construction which is beyond dispute, it is that the Longshoremen's Act, as this Court has repeatedly stated, "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." [15] A brief consideration of only a few of this Court's decisions will quickly demonstrate this proposition.

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13. See full discussion, *infra*, pages 21 to 24.

14. See full discussion, *infra*, pages 24 to 35.

15. *Voris v. Eikel*, 346 U.S. 328, at 333, 74 S.Ct. 88. 98 L.Ed. 5, 10 (1953)

In the legendary *Ryan* case,[16] this Court construed the following statutory language in Section 5 of the Act:

> "The liability of an employer . . . *shall be exclusive and in place of all other liability of such employer to the employee*, his legal representatives, husband or wife, parents, dependents, next of kin, *and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injuries or death* . . ." 33 U.S.C.A. § 905. (Emphasis supplied.)

While it was at that time and still is the view of counsel for the Amicus that this language is plain and unambiguous and does by its very terms prohibit any action by anyone against an employer within the meaning of the Act and that the Act as passed was intended by Congress to be the exclusive liability of the employer, nevertheless this Court held that all this language related to was any tort liability which an employer might have to the employee or anyone else. In so doing it held that the employer was subject to a suit by a third party shipowner who claimed indemnity for any damages it might have to pay an injured employee by virtue of an implied contractual obligation to stow the cargo on its vessel in a reasonably safe and workmanlike manner.[17] The effect

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16. *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956).

17. The typical *Ryan* indemnity case arose as follows: A longshoreman employed by an independent contractor stevedore would be injured on a vessel owned by a third party shipowner. The longshoreman would sue the shipowner for damages based on the unseaworthiness of the ship and/or the negligence of its crew and the shipowner was permitted to sue the independent contractor stevedore for indemnity for any damages the shipowner had to pay the stevedore's injured longshoreman employee. The stevedore's "exclusive liability" under Section 5 thus vanished under

of the Ryan decision was to limit Section 5 of the act to an employer's tort liabilities.

Six months after handing down the *Ryan* decision, the Court decided the *Czaplicki* case,[18] in which it chose to disregard what appeared to be the plain, literal meaning of the language of the Act in construing Section 33(b) which provided as follows:

> "*Acceptance of such compensation under an award* in a Compensation Order filed by the Deputy Commissioner *shall operate as an assignment to the employer of all right* of the person entitled to compensation *to recover damages against such third person* unless such person shall commence an action against such third person within six months after such award." 33 U.S.C.A. § 933(b).
> (Emphasis supplied.)

Even though this Court acknowledged that the statutory assignment provided for in this section of the Act had been fully and completely consummated in complete accordance with the plain statutory language, it went on to hold that Czaplicki could maintain an action against the third party shipowner because the statutory assignee was the insurance carrier for the third party vessel, and as statutory assignee it would in a sense be suing itself. Notwithstanding the apparent literal meaning of the statutory language, the Court concluded that "the statute should be construed to allow Czaplicki to enforce, in his own name, the rights of action that were his originally."

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the guise of *Ryan* being a contract action—and one implied in law, not just one which a stevedore could voluntarily accept in a written contract. The 1972 Amendments abolished *Ryan* indemnity. *See* 33 U.S.C.A. §905(b), *as amended* (Supp. 1975).

18. *Czaplicki v. SS HOEGH SILVERCLOUD*, 351 U.S. 525, 76 S.Ct. 946, 100 L.Ed. 1387 (1956).

Approximately seven years later in the *Yaka* case[19] this Court held that the exclusive liability of the employer to the employee in Section 5 was not to be applied in those circumstances where a longshoreman was employed directly by the shipowner and that such longshoremen were to have the same rights against their own shipowner-employer as did an employee of an independent contracting stevedore against a third party shipowner. Thus, despite the literal meaning of the language contained in Section 5 that "the liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury or death," 33 U.S.C.A. § 905 (a), in *Yaka*, the Court gave an employee a direct cause of action for unseaworthiness, which later evolved also into a cause of action for negligence, against his own employer, which in effect supplemented his right to compensation benefits under the Longshoremen's Act from his own employer.[20]

Mr. Justice Black justified the Court's decision by saying that "only blind adherence to the superficial meaning of a statute" [21] would permit the denial to a *Yaka* longshoreman the same rights which a longshoreman

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19. *Reed v. YAKA*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448, *Reh. den.* 375 U.S. 872, 84 S.Ct. 27, 11 L.Ed.2d 101 (1963).

20. We have to say "supplemented" rather than in addition to his compensation benefits, for when an employee received compensation benefits and prosecuted his *Yaka* action against his own shipowner employer, upon making a recovery based on unseaworthiness or negligence from his shipowner employer, the *Yaka* employee did have to give the employer credit for the amounts of money that the employer had paid him under the Longshoremen's Act.

21. 373 U.S. 410, 415, 83 S.Ct. 1349, 10 L.Ed.2d 448, 452, (1963).

employed by an independent contracting stevedore had against the vessel on which an injury occurred.

Approximately four years later in the *Jackson* case,[22] the Court reaffirmed its holding in *Yaka*. In declining to construe the language of Section 5 literally and to hold that an employer's exclusive liability to his employee was to be the Longshoremen's Act, Mr. Justice Black, speaking for the Court, stated in part:

> ". . . We cannot accept such a construction of the Act—an Act designed to provide equal justice to every longshoreman similarily situated. We cannot hold that Congress intended any such incongruous, absurd, and unjust result in passing this Act." [23]

If these cases stand for anything, they stand for the proposition that the Longshoremen's Act is to be construed liberally to obtain at the very least a reasonable and just result. Moreover, it is not necessary to go as far as this Court has already gone in liberally construing the Act to conclude that the terms "injured employee" and "employee" as used in the Act must be read to include within their meaning deceased employees and the beneficiaries of deceased employees. Any other construction —and certainly the construction taken by the Court below—does violence not only to Section 8(i) of the Act, but to many other provisions of the Act and leads to an "incongruous, absurd and unjust result." To avoid such a result, the instant Petition for Writ of Certiorari must be granted and the decision below reversed.

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22. *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488, (1967).

23. 386 U.S. 731, 735, 87 S.Ct. 1419, 18 L.Ed.2d 488, 491, (1967).

REASON NO. 2: THE STATUTORY DEFINITIONS

The definitions of the term "injury" and of the term "compensation", as contained in the Act, provide, so far as pertinent here, as follows:

> (2) The term "injury" means accidental injury or *death* arising out of and in the course of employment . . ." (Emphasis supplied) 33 U.S.C.A. § 902(2).
>
> (12) "Compensation" means the money allowance payable to an employee or *to his dependents . . . and includes funeral benefits . . .*" (Emphasis supplied) 33 U.S.C. § 902(12).

Under these definitions, "injured employee" as used in Section 8(i) must be construed to include not just an "injured employee" but a "deceased employee" as well. When so construed, the term employee obviously must include the beneficiaries who are "entitled to compensation"—the "money allowance payable to an employee or to his dependents" under the Act. Even the standard for approval of a settlement—"the best interests of an injured employee"—strictly and literally applied remains appropriate in death cases. The "best interests" of the beneficiaries must surely be to the "best interests" of the employee who is no longer there to provide for them. It is also illuminating to observe that, strictly speaking, Section 8(i) authorizes "agreed settlements of the *interested parties*" rather than agreed settlements between the employee and his employer, provided such settlement is in the "best interests of an injured employee entitled to compensation."

Contrary to what was expressed in the opinion below, the fact that Congress in the 1972 Amendments eliminated all references in Section 8(i) to the "injury" subdivisions (c) (21) and (e) of Section 8 and to Sections 14(b) and (i), providing that the compromise had to be paid in installments unless commuted to present value, indicates the intent of Congress to expand—not to restrict the approval of agreed settlements. The elimination of the requirement from Section 8(i) that agreed settlements had to be approved by the Secretary of Labor also evidences the Congressional intent to expand and not restrict the use of the agreed settlements.[24] Simply because the agreed settlement provisions of the Act are in Section 8, dealing with compensation for injury, and not Section 9, dealing with death benefits, should not be construed to limit settlements to injury cases only, for the second injury fund provisions contained in Section 8(f) encompass both injury and death cases, even though there are no second injury fund provisions in Section 9.

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24. Section 8(i) of the Act, 33 U.S.C. §908(i) read as follows prior to the 1972 Amendments:

(i) In cases under subdivision (c) (21) and subdivision (e) of this section, whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may, with the approval of the Secretary, approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of sections 915(b) and 916 of this title: *Provided,* That the sum so agreed upon shall be payable in installments as provided in section 914(b) of this title, which installments shall be subject to commutation under section 914(j) of this title: *And provided further,* That if the employee should die from causes other than the injury after the Secretary has approved an agreed settlement as provided for in this chapter, the sum so approved shall be payable, in the manner prescribed in this subdivision, to and for the benefit of the persons enumerated in subdivision (d) of this Section.

We respectfully submit that the statutory definitions and the foregoing factors compel the conclusion that both injury and death claims may be settled under Section 8(i).

REASON NO. 3: THE ABSURDITIES CREATED IN OTHER SECTIONS OF THE STATUTE

A consideration of the application of strict interpretation of the term "injured employee" adopted by the Court of Appeals to four other sections of the Longshoremen's Act quickly demonstrates its erroneousness.

1. Section 10[25]—Determination To Pay

Section 10 of the Act deals in major part with the determination of the average weekly wages on which an employee's weekly compensation rate is based. Subsection (a) provides that the average weekly wage shall be based on the employee's actual earnings if he works substantially the whole of the year, but if not, subsection (b) provides for the average weekly wage to be based on the earnings of some other worker in the same class who worked substantially the whole of the year prior to the injury, and if neither of the conditions of subsections (a) or (b) exist, subsection (c) provides the average weekly wage shall be based on what should reasonably represent the annual earning capacity of a worker considering various factors. In Section 10 (a) - (e) of the Act, Congress uses the term "injured employee" a total of seven times and the term "employee" a total of five times. Nowhere in Section 10 (a) - (e) does Congress ever refer to claims which will be made by an employee's beneficiaries in the event the injuries results in his death.

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25. 33 U.S.C.A. §910, *as amended,* (Supp. 1975).

Thus, using the interpretation of the terms "injured employee" and "employee" as not including a deceased employee's beneficiaries in the event of his death, the method of determining the average weekly wage on injury claims provided for in Section 10 cannot be used in determining death benefits under the Act. This would mean that in a death case one could only look to the actual average weekly wages of the deceased employee in ascertaining the average weekly wages upon which death benefits are to be determined according to Section 9. The significance of such an interpretation, of course, is that if the employee did not work substantially the whole of the year prior to the injury, his beneficiaries would have to have their benefits determined by what the deceased employee himself actually earned and not his reasonably anticipated earnings under the alternative provisions of Section 10(b), relating to the wages of a similar worker employed for substantially the whole of the year, or on what would reasonably represent his earning capacity under the provisions of Section 10(c).

An example will best illustrate the harsh and incongruous result which this produces. Assume an employee sustained an injury on February 1 from which he died 10 months later on December 1; that his average weekly wage was $150 per week but he did not work substantially the whole of the year prior to his injury; that the injured employee therefore relied on subsections (b) or (c) of Section 10, and the average weekly wage on which he was entitled to have his compensation based was found to be $300 per week.[26] In this assumed situation, the employee

26. These are realistic figures. In fact the difference could be even greater as some longshoremen earn far more than $300.00 per week and some far less than $150.00 per week.

would receive compensation at the rate of $200 per week based on the average weekly wage of $300 found under Section 10(b) or (c) during the 10 months of his disability prior to his death. However, if Section 10 (a) - (e) applies only to "claims of injured employees" as the Court below construes the term "injured employee" the death benefits to which the employee's beneficiaries would be entitled would have to be based on the deceased's own average weekly wages under Section 9. These are only $150 a week, which would give his beneficiaries compensation at the rate of only $100 per week or one-half of what the employees received for his disability.[27] However, if the terms "injured employee" and "employee" are properly construed to include an employee's beneficiaries, the beneficiaries would receive $200 per week in compensation since they too could rely on Section 10(a) - (b) - (c) in determining the average weekly wage on which their death benefits are to be based.[28]

We respectfully submit that in using the terms "injured employee" and "employee" in Section 10 of the Act, it is obvious that Congress intended to include not only living employees, but the beneficiaries of deceased employees as well. The same words should not be given an entirely different interpretation in Section 8 (i) as has been done by the Court below.

27. While this may not seem unduly harsh or incongrous since there is one less person to support after the employee's death, we do not think anyone would contend that Congress did not intend for the same average weekly wage to be used in determining both disability and death benefits.

28. Assuming at least two beneficiaries, such as a widow and one child survive. Even if only the widow survives, she would receive $150.00 per week, rather than $100.00 per week as the Court below would have it.

2. Section 21[29]—Review Of Compensation Orders

If the strict interpretation of the terms "injured employee" and "employee" which excludes a deceased employee's beneficiaries is followed, neither a Court of Appeals or the Benefits Review Board will have jurisdiction to review the action of the Administrative Law Judge in a death case arising under the Act and in this case the Court of Appeals for the Seventh Circuit should have entered an order directing the Benefits Review Board to set aside its order reversing the decision of the Administrative Law Judge and to dismiss the appeal to the Board for lack of jurisdiction. Section 21(b) (3) authorizes the Benefits Review Board "to hear and determine appeals . . . from decisions with respect to *claims of employees* . . ." (Emphasis supplied)[30] If the term "employee" does not include deceased employees' beneficiaries, then there is no statutory authority for a review of the Administrative Law Judge's decision approving the agreed settlement by the Benefits Review Board. Nowhere does this Section of the statute in any way refer to a death claim, a deceased employee, or to a deceased employee's beneficiaries, but as is true in Section 8 (i), refers only to employees and not their beneficiaries.

In turn, there would be no jurisdiction in the Courts of Appeal because Section 21, which is the sole source of such jurisdiction, gives to the Courts of Appeal the power to review only "A final order of the Board.[31] Obviously,

29. 33 U.S.C.A. §921.

30. 33 U.S.C.A. §921(b)(3).

31. 30 U.S.C.A. §921(c). Of course, it is basic Hornbook law that any judicial tribunal must examine and determine whether it has jurisdiction, if necessary on its own motion, if the issue is not raised by the parties. *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 62 S.Ct. 15, 86 L.Ed. 47 (1941); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951).

if the Benefits Review Board has jurisdiction to review only "decisions with respect to claims of employees," and the Courts of Appeal can review only final orders of the Board, the Seventh Circuit's interpretation of the term "injured employee" in Section 8(i) effectively divests the Courts of Appeal of jurisdiction in death cases. Thus, to be consistent with its strict interpretation of Section 8(i), the Court below should have entered an order remanding the case to the Board with directions to dismiss the appeal from the Administrative Law Judge's decision for lack of jurisdiction.

Neither Section 8(i) nor Section 21 should be so strictly construed as to produce such a harsh and incongruous result.

3. Section 15—Invalid Agreements[32]

Section 15 is the usual provision contained in most compensation acts which prohibits any agreement by an employee to pay a portion of the premium paid for coverage under the Act. Subsection (b) of Section 15 provides:

> "(b) No agreement by an *employee* to waive his right to compensation under this chapter shall be valid." (Emphasis supplied)

Here again, this Section of the statute refers only to an *employee* and makes no mention of a *deceased employee's beneficiaries*. Thus, if the Seventh Circuit's strict interpre-

32. 33 U.S.C.A. §915.

tation of the meaning of "employee" is adhered to, an employer would be free to require the employee's potential beneficiaries to pay a part of his insurance premium and after the employee's death, to settle any claim that the beneficiaries might have under the Longshoremen's Act by simply obtaining their agreement to waive their rights to compensation under the Act. If the strict interpretation placed on Section 8(i) of the Act by the Court below is followed, the Act prohibits only an employee from waiving his rights to compensation, not his beneficiaries. This, of course, would have the obvious effect of eliminating any necessity of obtaining the approval of any person, whether Deputy Commissioner, Administrative Law Judge or otherwise, of any settlement of a death claim under the Act. As the lower Court's opinion notes, this is neither customary nor desirable and, so far as we know, is not permitted by any workmen's compensation act, for such acts universally require approval of settlements by some appropriate authority charged with the administration or the adjudication of claims.

4. Section 4—Liability For Compensation[33]

Section 4(a) of the Act provides:

> "Every employer shall be liable for and shall secure the payment to his *employees* of the compensation payable under Sections 907, 908, and 909 of this title . . ." 33 U.S.C. §904(a). (Emphasis supplied)

Once again the strict construction of the term "employee" as applied by the Court below to Section 8(i) when applied to this Section of the Act means that the

33. 33 U.S.C.A. §904.

employer must secure the payment of compensation to his "employees" but not to his deceased employee's beneficiaries. While this Section refers to securing the payment of compensation under "death benefits" Section 9 of the Act, this reference to Section 9 becomes meaningless since the employer has to secure the payment of compensation only to his "employees" and an "employee" obviously is not entitled to any compensation for his own death, as Section 9 demonstrates.

We believe that a consideration of these four sections of the Act is sufficient to demonstrate that the literal interpretation placed on the meaning of the term "employee" in Section 8(i) relating to agreed settlements by the Court below is incorrect. We submit it is as equally obvious in Section 8(i), as it is in the other four sections of the Act discussed, that Congress did not intend the word "employee" to be limited to this extent, but used it in the broadest possible sense to encompass not simply living employees, but deceased employees' beneficiaries as well. This is, of course, entirely consistent with the statutory definitions of the term "injury" and of the term "compensation" as used in the Act. As was observed by Judge Learned Hand concurring in *Guiseppi* v. *Walling,* (2nd Cir. 1944) 144 F. 2d 608, 624, "There is no surer way to misread any document than to read it literally . . ."

REASON NO. 4: IMMEDIATE RESOLUTION NEEDED FOR PROPER ADMINISTRATION OF ACT

If the decision below is allowed to stand without review by this Court and if it is acquiesed in by those officials of the Department of Labor who are charged with administering the Act and the administrative process it contem-

plates, as appears will be the case, it will no longer be possible to compromise and settle controverted death claims that arise under the Act. The parties will thus be forced to litigate all controverted death claims whether they wish to or not, with the prospect for each of an "all or nothing" result. The facts of this case provide a dramatic example of the "all or nothing" gamble that will (and is being) faced by employees and employers alike. If it is found in this case that blood transfusions would have saved the deceased employee's life and that such transfusions were unreasonably refused by the deceased employee, his dependent wife will receive nothing; if the finding is to the contrary, she will receive the full amount of death benefits available to her under the Act. There will be no middle ground; no room for compromise. There can be little doubt of the injustice of this approach. This is to say nothing of the effiect this approach will have on the administration of the Act. If the "all or nothing" approach were extended to our District Courts, there could be no doubt that the effects would be little short of disasterous. This case is clearly of great significance to all those who are affected by the Longshoremen's Act and concerned with the administration of the various compensation programs which are controlled by the Act.

One of the most compelling reasons for the allowance of the Writ is that in all reasonable probability the issue of whether the Longshoremen's Act authorizes the approval of the agreed settlement of death claims will never again be ripe for judicial review. The reason for this is obvious. If, as presently appears to be the case, the decision of the Court below is followed throughout the nation by the various administrative officers charged with adjudicating claims under the Act on a uniform basis,

whenever a compromise settlement of a controverted death claim is presented for approval, approval will be denied and the parties will be required to litigate. Once the merits of the claim have been adjudicated, it is very unlikely that the issue raised by the refusal to approve the settlement can be presented for judicial review. For instance, if the decision below is followed, any application for approval of an agreed settlement in a death case would be denied by the Deputy Commissioner at an informal conference at the outset of the administrative process. Once the claim was litigated at a formal evidentiary hearing before an Administrative Law Judge, the losing party would be seeking review in an attempt to overturn the result on the merits and the initial application for approval of the settlement would not be preserved in the record on which review could be sought.

Review of a disallowance of an agreed death claim settlement could be obtained, if at all, only on the basis of the employee's beneficiaries and the employer agreeing to abide by the settlement which had been disallowed regardless of who prevailed on the formal hearing, with the sole purpose of creating conflict among the Courts of Appeal. As a practical matter this is not a realistic possibility. Likewise, it is not reasonable to expect a Deputy Commissioner, Administrative Law Judge or the Benefits Review Board to approve a settlement in a death case, as was done by the Administrative Law Judge in this case, in the face of the acceptance of the holding below by the Secretary of Labor, since all of these — the Deputy Commissioners, the Administrative Law Judges, and members of the Benefits Review Board — serve to some extent at the pleasure of the Secretary of Labor.

The inescapable conclusion is that it is not probable that the issue of death claim settlement approval will be again considered by a Court of Appeals or that the question will ripen into a traditional "conflict among the circuits" situation and then again be presented to this Court for consideration. If *certiorari* is not granted here, the decision of the Seventh Circuit will in all probability be the final word on the question unless Congress chooses to intervene. For this reason alone, the Court should take this opportunity to consider the issue and resolve it.

REASON NO. 5: APPROVAL OF AGREED SETTLEMENTS

As pointed out at the outset, the original issue presented to the Court of Appeals in this case was whether an administrative law judge is authorized to approve agreed settlements among the parties in controverted claims arising under the Longshoremen's Act, as amended. In holding that the Act does not authorize the agreed settlement of death claims, the Court below found it unnecessary to reach this issue.

It is the position of the West Gulf Maritime Association, however, that the Benefit Review Board's decision should also be considered and that the underlying question of the Administrative Law Judge's settlement approval authority be considered and clarified by the Court. The question of authority to approve settlements under the Act is obviously of great significance to the future administration of the Act and should be decided now, rather than later, so that the application of this aspect of the Act may be uniform among the Circuits, particularly in view of the fact the Benefit Review Board's position has

already been rejected by the Court of Appeals for the Fifth Circuit.[34].

The Director of the Office of Workmen's Compensation Programs of the United States Department of Labor has taken the position that the power to approve settlements of controverted claims under the amended Act is vested exclusively in the regional Deputy Commissioners of the Office of Workmen's Compensation Programs and that the Administrative Law Judge assigned to hear and decide a controverted claim under the Act once it reaches the formal evidentiary hearing phase of the adjudicative process is without authority to approve settlements agreed to by the parties.[35] This position has been upheld by the Benefits Review Board of the U. S. Department of Labor

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34. The Fifth Circuit granted a Motion to Approve Compromise settlement submitted by the parties in a Longshore Act injury case on appeal from the Benefits Review Board in an unpublished order. ***Ingalls Shipbuilding Corporation and American Mutual Liability Insurance Company v. Robert E. Spicer and the United States Department of Labor, Benefits Review Board,*** No. 74-3465 (Order entered April 18, 1975). The Secretary of Labor opposed approval of the settlment by the Court and filed a Motion for Remand.

35. A two stage adjudicative process has been established under the Regulations issued by the Secretary of Labor, 20 C.F.R. 702, et seq. After the filing of a Notice of Contravention by an employer, the Deputy Commissioner or his designee calls an informal pre-hearing conference or conferences, 20 C.F.R. §702.311, in order "to resolve disputes with respect to claims in a manner to design to protect the rights of the parties and also resolve such dispute at the earliest practical date." *Id.* at §702.311. If agreement on all issues cannot be reached at the informal pre-hearing conference stage, the Deputy Commissioner is to transfer the case to the Office of the Chief Administrative Law Judge for a formal evidentiary hearing. 20 C.F.R. §702.316.

in the order presently before this Court for review and in two to subsequent orders.[36]

The West Gulf Maritime Association submits that Director's position is based on a misreading of the applicable provisions of the amended Act and imposes on the parties — claimaints, employers and carriers alike — an unncessarily duplicative and uncertain procedure that has the effect of discouraging the settlement of controverted claims after completion of the informal stages of the Act's adjudicative process.

As noted above, Section 8 (i) (A) of the Act initially vests the authority to approve the settlement of controverted claims agreed to by the parties in the Deputy Commissioner. The Act therefore clearly provides that the Deputy Commissioner has the duty, power, and responsibility to approve agreed settlements, obviously only so long as the claim is under his administrative jurisdiction. If the claimant and the employer-insurance carrier are unable to reach an agreement on all issues before the Deputy Commissioner, the Deputy Commissioner must then transfer the claim to the Office of the Chief Administrative Law Judge for an evidentiary hearing on any remaining disputed issues.[37] The Director has contended below, and the Benefits Review Board has held, that when this transfer is made, the Deputy Commissioner retains the power,

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36. *Director, Office of Workmen's Compensation Programs, U.S. Department of Labor v. Jordan, Holmes & Narver, Inc.*, and *Commercial Union Insurance Co. of Newark, N.J.*, BRB 74-143, 1 BRBS 45, (July 24, 1974); *Director, Office of Workmen's Compensation Programs, U.S. Department of Labor v. Wills, H.N.A., Inc.* and *A.F.I.A. Worldwide Insurance Co.* and *Commercial Insurance of* Newark, BRB 74-147, 1 BRBS 47, (July 30, 1974).

37. 20 CFR §702.316.

duty and responsibility to approve agreed settlements under the Act. The erroneousness of this position is found in the plain and unequivocal language of Section 19(d) of the Act:

> "Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of Section 554 of Title 5. Any such hearing shall be conducted by a hearing examiner [administrative law judge] qualified under Section 3105 of that Title. *All powers, duties, and responsibilities vested by this chapter, on October 27 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners* [*administrative law judges*]." 33 U.S.C.A. § 919(d), *as amended* (Supp. 1975) (bracketed expressions and emphasis supplied.)

Prior to the 1972 Amendments to the Act, the Deputy Commissioner not only presided over the informal administrative procedures with respect to a claim, but also served as the hearing officers at any formal evidentiary hearing and decided any issue which the parties were unable to resolve by agreement through informal administrative procedures. It is undisputed that the Deputy Commissioner had the power to approve agreed settlements under Section 8(i) both during the course of their informal administrative procedures and during their formal evidentiary hearing procedures prior to the 1972 Amendments.[38] This power to approve such agreed settle-

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38. While the Deputy Commissioner's power to approve agreed settlements prior to the 1972 Amendments was subject to the "approval of the Secretary" of Labor or his designee, this was clearly one of his "powers, duties and responsibilities" on the date of enactment of the 1972 Amendments, October 27, 1972.

ments during the formal evidentiary hearing procedures was expressly taken from the Deputy Commissioners and "vested" in the Administrative Law Judges when Congress added Subsection (d) to Section 19 of the Act in amending it in 1972.[39]

The authority to approve settlements agreed upon by the interested parties is basically an adjudicative function and therefore is a power, duty or responsibility with respect to an evidentiary hearing of a controverted claim delegated to the Administrative Law Judge under Section 19(d) of the Act. Indeed, the power to approve the settlement of controverted matters being adjudicated before any tribunal, whether judicial or quasi-judicial, is inherent in the power to adjudicate.

Section 554 of Title 5, United States Code, under which any formal evidentiary hearing under the Longshoremen's Act is required by Section 19(d) to be conducted, provides in part:

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39. While the language used by Congress in Section 19(d) is clear and unambiguous and no resort to legislative history is necessary, the legislative history established that it was the intent of Congress to transfer not just a part, but *all* of the Deputy Commissioner's powers, duties, and responsibilities with respect to the evidentiary hearing procedures under the Act to the Administrative Law Judges. In relevant part the House Report states:

> " . . . It is the Committee's belief that the admiration of the Longshoremen's and Harbor Workers' Compensation Act has suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings. Moreover, with the new responsibilities that will desolve upon the Secretary with the passage of this bill, it will be extremely important to have fulltime able administrators who will not have to wear the dual hat of being hearing officers for the purpose of the disputes brought under this statute." House Report 92-1441, 92nd Cong., 2nd Sess., Sept. 25, 1972, page 11; 1972 U.S. Code Cong. & Administrative News, p. 4708.

The Senate Report contains an identical statement, Senate Report No. 92-1125; 92nd Cong., 2nd Sess., Sept. 12, 1972, p. 13.

> "(c) The agency [here the Offices of Workmen's Compensation Programs through the Administrative Law Judge] shall give all interested parties opportunity for
>
> (1) the submission and consideration of facts, arguments, offers of settlement or proposals of adjustment when time, the nature of the proceedings and the public interest permit; and
>
> (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with Section 556 [dealing with hearings] and 557 [dealing with decisions] of this title." 5 U.S.C.A. § 554(c). (Bracketed expressions supplied.)

Section 554 applies "in every case of adjudication required by statute to be determined on the record and the opportunity for an agency hearing", 5 U.S.C.A. § 554(a), and "adjudication", in turn, is defined under the Administrative Procedure Act as "agency process for the formulation of an order." 5 U.S.C.A. § 551(7).

Significantly, the Department of Labor has itself recognized the adjucative nature of the approval of agreed settlements under the amended Act by requiring in its regulations on the subject, 20 CFR § 702.241, that a *record* be made through the filing of an application which "shall set forth fully all facts necessary to disclose the status of the case and the reason for seeking approval of an agreed settlement under said section of the Act as well as the specific terms of such agreed settlement, and

shall be accompanied by a medical report of examination of the employee. . ." *Id.* § 702.241(b). Subsection (c) of the Regulation goes on to require that "If the deputy commissioner determines that the injured employee is entired to compensation and that the proposed agreed settlement . . . is for the best interests of such employee, he shall file a *compensation order* making necessary *findings of fact* relative to the character and quality of disability and effect of same with respect to the employee's wage and wage-earning capacity prior to approving such settlement and discharging the employer's liability for compensation payments. . ." (Emphasis supplied.)

From this, it is clear that the approval of agreed settlements of controverted claims under the amended Act is an adjudicative function as defined by the Administrative Procedure Act, 5 U.S.C.A. § 500 *et seq.*, and therefore included within the powers, duties, or responsibilities delegated by Section 19(d) of the amended Act to the Administrative Law Judge assigned to preside over a formal evidentiary hearing and render a decision on a controverted claim.

As the Director of the Office of Workmen's Compensation Programs and the Benefits Review Board would have it, a settlement reached after a controverted claim entered the formal evidentiary hearing phase of the adjudicative process could not be approved by the presiding Administrative Law Judge assigned to that case, even though the approval of such a settlement is clearly an adjudicative function and even though standards to be employed in determining whether such approval should be granted are clearly set out in the applicable regulation, which requires that appropriate findings of fact and a

compensation order be entered. Instead, the Director and Board would have the formal evidentiary hearing terminated, the claim remanded to the Deputy Commissioner, and a separate procedure instituted before the Deputy Commissioner in which a detailed application would be filed, findings of fact made and a compensation order entered, if the Deputy Commissioner approved.

This approach creates many practical difficulties which can have no other effect than the discouragement of agreed settlements. For example, assume that during a recess in a formal evidentiary hearing before an Administrative Law Judge, the parties, as a result of trial developments, determine that it would be in their mutual best interest to settle the claim. Upon re-entering the hearing room and informing the Administrative Law Judge that settlement had been agreed to, they might be told, if the position of the Director and the holding of the Board is adopted, that the Administrative Law Judge has no authority to approve a settlement, but that he would remand the case to the Deputy Commissioner to allow the parties to make the necessary application to the Deputy Commissioner for approval of their settlement. If the Deputy Commissioner refused to approve the settlement, as he is empowered to do under Section 8(i)(A) of the amended Act, the Deputy Commissioner would return the case to the Administrative Law Judge who would then have to reset and resume the formal evidentiary hearing as if it was still a contested and disputed claim, now unnecessarily delayed and bifurcated.[40] It would also be possible for the Administrative

40. Since all of the administrative law judges are stationed in Washington, D.C., resetting and resuming the hearing is not a simple or inexpensive task. The only alternative to this would be

Law Judge to refuse to suspend the hearing and allow the parties to make their application to the Deputy Commissioner only after the conclusion of the hearing, thereby creating a "race to judgment" between the Administrative Law Judge and the Deputy Commissioner. Neither situation would be conducive to the encouragement of settlements at the formal evidentiary hearing stage of the proceedings.[41]

The holding of the Benefits Review Board, for which review is being sought, in effect gives a Deputy Commissioner a "Russian veto" by which he can require an Administrative Law Judge to fully hear and render a decision on a claim when all of the parties—claimant, employer and insurance carrier—and even the Administrative Law Judge believe it should be settled based on an agreement of the parties.[42] How much more efficient

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for the deputy commissioners to attend all formal hearings so they could approve or disapprove an agreed settlement if one was reached by the parties during the course of a hearing. Two hearing officers to decide different but at the same time issues to be determined from the same evidence at the same hearing is a rather ludicrous prospect.

41. While it is difficult to see how the Director and the Board have arrived at the conclusion that the Deputy Commissioner and Administrative Law Judge have concurrent jurisdiction—once the case has been transferred to the Office of the Chief Administrative Law Judge as required by the Director's own regulations, 30 CFR §702.316, this is precisely the position of both the Director and the Board.

42. Indeed, if the Administrative Law Judge never acquired the power (jurisdiction) to approve agreed settlements because it remained vested solely in the Deputy Commissioner, neither this Court nor a Court of Appeals would have the power to approve an agreed settlement of the parties, but rather would be required to await advices from the Deputy Commissioner either that he had approved the settlement or would not do so, which effectively would amount to an order or direction to a Court of Appeals to decide a

and economical it would be for the Administrative Law Judge to hear the application for settlement and either approve it and enter the appropriate findings of facts and compensation order or disapprove the application and compensation order or disapprove the application and immediately return to the evidentiary hearing on the merits of the controverted claim. It is submitted that these are precisely the type of practical problems Congress intended to prevent by the enactment of Section 19(b) of the Act, delegating to the Administrative Law Judge *all*, not just some, of the powers, duties and responsibilities previously vested in the Deputy Commissioner with respect to formal evidentiary hearings.

The West Gulf Maritime Association can appreciate the Director's legitimate concern for the integrity of the programs he administers and the rights of the beneficiaries thereunder, but is unable to understand the reluctance of the Director to recognize the power of an Administrative Law Judge to approve or disapprove agreed settlements during the formal evidentiary hearing phase on a controverted claim. In any event, the Director's concerns are fully protected in several ways:

1. The Regulations made the Director an "interested party" at any such formal evidentiary hearings who may fully participate in such hearings.[43]

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case that the Court believed should be settled! This position has been rejected by the Court of Appeals for the Fifth Circuit. *See* footnote 34, *supra*. Also see full discussion under Reason No. 3, supra, pages 11 to 16.

43. 20 CFR §702.33(b) defining parties to a formal hearing so provides:

"(b) The Solicitor of Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested Party."

2. The Administrative Law Judge involved in this area are entrusted by express statutory and regulatory provision with the adjudication of all contested claims. Surely, the persons who are charged with the application of the provisions of the Longshoremen's Act and the policy which underlies it through the adjudication of contested matters arising under the Act, will apply those same provisions and policies with equal vigor in those cases where the parties reach an agreed settlement during the course of the evidentiary hearing procedures.

3. The claimants are always represented by an attorney at the formal stage of the adjudicative process, usually one of their own selection or one recommended by a Deputy Commissioner, or upon their request, one furnished by the Secretary of Labor as provided in Section 39(c)(1), of the Act, 33 U.S.C.A. § 939(c)(1), as amended, (Supp. 1974).

4. Should the Director be dissatisfied with an Administrative Law Judge approval or disapproval of an agreed settlement, the Regulations give him the right to appeal the compensation order approving or disapproving such a settlement to the Benefits Review Board. In this regard, it is noteworthy that the compensation order entered in this case was appealed to the Benefits Review Board by the Director pursuant to these regulations.[44]

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44. 20 CFR §802.201(a) provides "Any party in interest . . . may appeal . . ." and Section 801.2(10) provides that the terms " 'Party' or 'Party in interest' means the Secretary [of Labor] or his designee. . . .", among others.

One of the main purposes of any adjudicative process, be it judicial or administrative, is to encourage the fair, equitable and expeditious settlement of disputes. Indeed, it is Hornbook law that the encouragement of settlements is one of the strongest policies of the law. If the position espoused in the decision of the Benefits Review Board for which review is being sought is followed, the settlement of controverted claims under the Longshoremen's Act will be discouraged once they reach what is the equivalent of the trial stage in the United States District Courts. This will be unfortunate, for as any experienced trial lawyer or trial judge knows, many cases, particularly personal injury cases, frequently do not settle, and often cannot be settled, until the trial stage has been reached and often expose the litigants to an all or nothing "roll of the dice" exposure if no settlement is possible. While early settlements are to be encouraged, late settlements ought not to be discouraged.

The West Gulf Maritime Association therefore respectfully submits that the express provisions of Section 19(d) of the Act, the practical conduct of formal evidentiary hearings by Administrative Law Judges and the policy of law to encourage settlements compel the conclusion that an Administrative Law Judge hearing a controverted claim brought under the Longshoremen's Act has the power, duty and responsibility to approve and/or disapprove settlements agreed to by the parties as their discretion may dictate. The Petition for Writ of Certiorari should be granted so that this important issue can be decided.

CONCLUSION

For the various reasons discussed above, the West Gulf Maritime Association, *amicus curiae,* respectfully urges that the Petition for Writ of Certiorari filed herein be granted and that the decision of the Court below be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, E. D. Vickery, one of the attorneys for West Gulf Maritime Association, *Amicus Curiae* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of November, 1975, I served copies of the foregoing Brief of Amicus Curiae in Support of Petition For Writ of Certiorari on the several parties as follows:

1. On the Petitioners, S. H. Dupuy and Liberty Mutual Insurance Company, by mailing three copies in a duly addressed envelope, with first class, air mail postage prepaid, to their attorney of record, Mr. Carl N. Otjen, Esq. of Otjen, Philipp & Van Ert, S.C., 741 N. Milwaukee Street, Suite 900, Milwaukee, Wisconsin 53202.

2. On the Respondent, the Director of the Office of Workmen's Compensation Programs, United States Department of Labor, by mailing three copies in a duly addressed envelope, with first class, air mail postage prepaid, to his attorney of record, the Honorable Robert H. Bork, Solicitor General of the United States, United States Department of Justice, Constitution Avenue and Tenth Street, N.W., Washington, D.C. 20530.

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